The blurring distinction between public and private in international dispute resolution

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ZOOM OUT

The question:

The blurring distinction between public and private in international dispute resolution

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It is a truism that international cooperation has moved beyond intergovernmental state structures and that we have become aware of alternative processes, actors and output where law-making is concerned.[1] State territories have not hindered the development of, for instance, global supply chains[2] and the transfer of regulatory power beyond the state and from public to private regulators.[3] The current architecture of global governance includes a variety of different forms of bilateral and multilateral cooperation. At the global level, alongside the more traditional ways to create international law through the conclusion of treaties or customary law, for a number of decades now there has been a tendency to engage in alternative methods to generate international agreement.[4] Indeed, although for most pressing trans-boundary issues such as trade, investment, health, finance and human rights, institutional frameworks have been established for many years and are fully operational, regulators have simultaneously been looking for less institutionalised forms of rule-making.

[1] J Pauwelyn, RA Wessel, J Wouters (eds), *Informal International Lawmaking* (OUP 2012).

[2] S Marassi, 'International Framework Agreements and Management of Global Supply Chain: Extra-Legal Mechanisms to Enforce International Labour Standards' in this Zoom Out.

[3] B Warwas, 'The Application of Arbitration in Transnational Private Regulation: An Analytical Framework and Recommendations for Future Research' in this Zoom Out.

[4] K Raustiala, 'Form and Substance in International Agreements' (2005) 99 AJIL 581-614; J Pauwelyn, RA Wessel, J Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 European J Intl L 733-763; and for the European Union: RA Wessel, 'Normative Transformations in EU External Relations: The Phenomenon of "Soft" International Agreements' (2020) West European Politics.

One of the most commonly heard justifications for this observation is the search by states, sub-state entities and private actors to engage in interaction across national borders that results in more desirable, detailed and effective regulation in technical or highly political matters.[5]

This development has revealed an entanglement of public and private spheres of governance. Public authority, as the argument goes, is no longer (merely) exercised by national governmental actors, but (increasingly) by both public and private actors outside of existing state-structures.[6] The examples are well-known: ICANN sets the rules on the internet, the Codex Alimentarius Commission defines our food safety, decisions on pharmaceuticals are taken by the International Conference on the Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), and almost all technical standards of products we use on a daily basis are set by the ISO. In addition to that, rules often find their basis in complex international arrangements that are far less accessible, transparent and comprehensible than regular treaties or national rules. We have accepted that governance by states is gradually supplemented – or replaced – by global governance in which many more actors play a role and where the distinction between public and private rules is less easy to make.

Alternative methods to generate international (legal) rules have gone hand in hand with the creation of alternative dispute resolution (ADR) mechanisms.[7] While many of these mechanisms may originate from international and transnational private law structures,[8] the point is that these mechanisms are increasingly to be seen as forming part of the 'public' world and have clear links with public interests due to the increasing

[5] ibid.

[6] M Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (OUP 2018).

[7] H Eidenmüller, H Großerichter, 'Alternative Dispute Resolution' in J Basedow, G Rühl, F Ferrari, P de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 58–66; see on the dispute settlement mechanisms connected to formal international organizations KJ Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton UP 2014).

[8] F Cafaggi (ed), *Enforcement of Transnational Private Regulation* (Edward Elgar 2012).

influence of, for instance regulatory bodies and norms on individuals.[9] While the term 'alternative' in ADR may have related to seeking redress in 'non-legal' or 'non-judicial' forms of arbitration, these days the distinction between these different forms may be less crucial. Even in public law settings, private mediation is often suggested by public authorities and systems as a first step or alternative.[10]

As underlined by the contributions to this Zoom Out, these questions are not only relevant in relation to the changes in the international legal system, but also in European law and policies.[11] Although the Court of Justice of the European Union itself has a role in dispute settlement, international fora in which the EU can participate in legal proceedings are rare.[12] While Opinion 2/13 (on the ECHR) underlined the difficulties of a combination of EU law and international dispute settlement, Opinion 1/17 (on CETA) revealed that external dispute resolution is not necessarily a threat to the EU's autonomy.[13] The Investment Court System (ICS) in CETA reveals the idea of protecting the rights of private investors not on the basis of traditional ad hoc Investor-State Dispute Settlement (ISDS), but by a real 'Court' with an appeal possibility, with appointed 'judges' that forms part of an inter-state agreement. Here also, mediation is suggested as an alternative means of dispute resolution (Art. 8.20(1) CETA). And, before claims can be submitted to the Tribunal, 'consultations' must have taken place (Art. 8.23(1) CETA). A 'private

[9] See already A Von Bogdandy, R Wolfrum, J von Bernstorff, Ph Dann, M Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010).

[10] Cf KJ de Graaf, AT Marseille, HD Tolsma, 'Mediation in Administrative Proceedings: A Comparative Perspective', in DC Dragos, B Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014) 589-605.

[11] See in general M Cremona, A Thies, RA Wessel (eds), *The European Union and International Dispute Settlement* (Hart Publishing 2017).

[12] See also A Rosas, 'The European Union and International Dispute Settlement', in L Boisson de Chazournes, C Romano and R Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers Inc 2002) 49; and F Hoffmeister, 'The European Union and the Peaceful Settlement of International Disputes' (2012) 11 Chinese J Intl L 77.

[13] Opinion 2/13, ECLI:EU:C:2014:2454; Opinion 1/17, ECLI:EU:C:2019:341. See on the criteria L Pantaleo, 'The Future of Investment Arbitration in the Light of Opinion 1/17' in this Zoom Out. See on the notion of 'autonomy' also E Kassoti, J Odermatt, 'The Evolution of Autonomy. Some Reflections on Investor-State Dispute Settlement in the Light of Opinion 1/17' in this Zoom Out.

interest' element is introduced by the possibility for non-governmental persons to submit amicus curiae briefs to the arbitration panel.[14]

Recent dispute settlement mechanisms reveal 'a mix of public and private components',[15] which is a clear reflection of the blurring lines between public (or international) and private (or transnational) forms of cooperation. While transnational regulation and informal international law-making was booming over the past decades (at the cost of traditional intergovernmental cooperation),[16] the contributions to this Zoom Out underline that this is not a one-way street and that is becoming increasingly difficult to distinguish 'alternative' dispute settlement from its 'judicial' counterpart.

[14] See art 43 of the Rules of Procedure.
[15] L Pantaleo (n 13).
[16] Pauwelyn, Wessel, Wouters, 'When Structures Become Shackles' (n 4).